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No. 15-1204

IN THE

Supreme Court of the United States

DAVID JENNINGS, *et al.*,
Petitioners,

v.

ALEJANDRO RODRIGUEZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

SEAN COMMONS
WEN W. SHEN
SIDLEY AUSTIN LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

JUDY RABIN[illegible]VITZ
MICHAEL T[illegible]N
ACLU IMMIGRANTS' RIGHTS PROJECT
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2618

AHILAN T. ARULANANTHAM*
MICHAEL KAUFMAN
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5211
aarulanantham@aclusocal.org

JAYASHRI SRIKANTIAH
STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-2442

Counsel for Respondent

May 10, 2016 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This case concerns noncitizens whom the Government has incarcerated for more than six months without a hearing to determine if their detention remains justified. Our legal system rarely, if ever, permits incarceration for the lengths at issue here with no opportunity to be heard before a neutral decisionmaker. The questions presented are:

1. Whether, to avoid the serious constitutional problems created by prolonged detention, 8 U.S.C. 1225(b) should be construed to provide an individual detained for more than six months with a hearing where an Immigration Judge can determine whether their detention remains justified.

2. Whether, to avoid the serious constitutional problems created by prolonged detention, 8 U.S.C. 1226(c) should be construed to provide an individual detained for more than six months with a hearing where an Immigration Judge can determine whether their detention remains justified.

3. Whether, before subjecting an individual to detention exceeding six months, the government must provide the same hearing protections that this Court has required in other civil detention contexts.

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INTRODUCTION

The Government seeks review of three entirely distinct questions arising from its confinement of three different groups of individuals detained under different statutory and regulatory regimes. None of the questions warrants review.

There is no circuit split on the first question, nor is one likely to develop. Because Section 1225(b) authorizes the detention of lawful permanent residents as well as people apprehended after they have already entered the United States—i.e., individuals who indisputably have due process rights with respect to their detention—the proper construction of Section 1225(b) is dictated by *Clark v. Martinez*, 543 U.S. 371 (2005), and gives rise to no conflict with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953).

As to the second question, all five circuits to address it agree that Section 1226(c) must be read to include a limit on the length of detention it authorizes; Mr. Rodriguez would have won in all of them. No circuit has accepted the Government's view that Section 1226(c) mandates detention without a hearing for the duration of an individual's removal case regardless of length. The circuits differ only on *when* and *how* to ensure that detentions remain reasonable, and this Court would benefit from allowing the circuits' positions to continue to percolate.

There is also no split on the third question, regarding the protections applicable in prolonged detention hearings. The Ninth Circuit's decision is consistent both with other circuits and with principles that this Court has endorsed in other civil

contexts where, as here, the "individual interests at stake . . . are both 'particularly important' and 'more substantial than mere loss of money.'" *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

The Government's contention that certiorari is warranted to preserve its ability to control the borders and reduce the risk of terrorism is hyperbolic and unsupported by anything in the decision below or the voluminous record compiled in the district court. The injunction has operated in largely its present form since November 2012 with no evidence of adverse effects on immigration enforcement. The injunction does not mandate anyone's release. It merely requires hearings before Immigration Judges. Those judges answer to the Attorney General, who has ultimate authority to reverse any release decisions.

Nor does this case concern "terrorist aliens," as they are expressly excluded from the Class definition. The Government has ample authority to detain individuals without hearings under statutes that specifically authorize prolonged detention in national security cases. The Government has never identified even a single Class member who presented a national security threat.

Finally, the Government's hypothetical assertions that the prospect of hearings once detention exceeds six months will create an incentive for individuals to cross the border illegally and delay their cases while detained also lack any record support. Even before the preliminary and permanent injunctions in this case, the Government already provided bond hearings to thousands of individuals apprehended in the border region at the outset of their detention, as soon as they pass an initial interview to determine if they have a credible fear of persecution. Thus, the Ninth

Circuit's rule provides little if any additional incentive. Likewise, there is no record evidence that, since the injunction, detainees have attempted to unreasonably delay their cases (and prolong their detention) in hopes of obtaining a hearing. Even if there were, that problem would be addressed at the detention hearing itself, where an Immigration Judge retains authority to use such delay as a basis for denying release.

COUNTER-STATEMENT OF THE CASE

I. LEGAL FRAMEWORK

The Government's account of the legal framework applicable to each Subclass overstates the effects of the Ninth Circuit's decision. Most important, the decision applies only to individuals subject to prolonged detention.

A. Prolonged Detention Without Hearings Under Section 1225(b)

Only two provisions of Section 1225(b) are at issue here: Section 1225(b)(1)(B)(ii) and Section 1225(b)(2)(A). App. 108a. These provisions apply only to the small percentage of individuals arriving at our borders whom the Government will refer for full removal proceedings before an Immigration Judge. The overwhelming majority of such individuals are asylum seekers who have previously established a credible fear of persecution and are detained under Section 1225(b)(1)(B)(ii). They are part of the Section 1225(b) Subclass because the Government chooses to detain them while they pursue bona fide asylum claims. *See* 8 U.S.C. 1225(b)(1)(B)(ii) (authorizing detention of individuals who establish a credible fear of persecution and are referred for full removal proceedings). In contrast, most individuals who arrive

at the border without valid documents are denied admission, detained, and removed without ever appearing before an Immigration Judge. 8 U.S.C. 1225(b)(1)(A)(i); 8 U.S.C. 1225(b)(1)(B)(iii)(IV) (mandating detention after initial finding of no credible fear, including during any appeal thereof).

Section 1225(b)(2)(A) authorizes the detention of "other" noncitizens not clearly entitled to admission, including returning lawful residents (LPRs) stopped at the border after brief travel abroad if, *inter alia*, they have certain prior convictions or if DHS officials believe they engaged in illegal activity while abroad. *See, e.g.*, *Landon v. Plasencia*, 459 U.S. 21 (1982); 8 U.S.C. 1101(a)(13)(C) (defining circumstances under which returning LPRs will be deemed to be "seeking . . . admission"). Because the regulations classify such returning LPRs as "arriving aliens," they are read to prohibit Immigration Judges from reviewing the custody status of returning LPRs. 8 C.F.R. 1003.19(h)(2)(i), 1236.1. Prior to the Ninth Circuit's decision, these individuals were subject to prolonged detention without hearings.

While the Government claims that detention of Section 1225(b) Subclass members is mandatory, Pet. 12-13, it releases many such individuals on parole. In addition, it already provides bond hearings to some detainees subject to Section 1225(b)—those who entered the United States without inspection, were placed into "expedited removal" proceedings, and then passed a credible fear interview. *Matter of X-K-*, 23 I. & N. Dec. 731, 734-35 (B.I.A. 2005).

B. Mandatory Detention Under Section 1226(c)

The Government subjects a broad range of individuals to mandatory detention under Section

1226(c) pending completion of their removal cases, including many individuals with substantial defenses to removal. Individuals subject to mandatory detention under Section 1226(c) may challenge the basis for that classification at a hearing before an Immigration Judge. *See* Pet. 4-5 (citing 8 C.F.R. 1003.19(h)(2)(ii)). However, to escape mandatory detention and thereby obtain a bond hearing, a detainee must show that DHS is "substantially unlikely to prevail" on its claim that the conviction at issue triggers mandatory detention. *Matter of Joseph*, 22 I. & N. Dec. 799, 807 (B.I.A. 1999). A "strong argument" against DHS's position does not suffice. *Compare Demore v. Kim*, 538 U.S. 510, 578 (2003) (Breyer, J., dissenting), *with Matter of Flores-Lopez*, No. A43 738 693, 2008 WL 762690, at *1-2 (B.I.A. Mar. 5, 2008). Thus, many individuals who will prevail in their removal cases are nonetheless subject to mandatory detention during the process.

The Government also interprets the mandatory detention requirement to apply even where an individual is eligible for relief from removal. For example, in the Government's view, LPRs with a conviction for a controlled substance offense like simple possession—which is not an aggravated felony—are subject to mandatory detention, even though they are not necessarily barred from seeking cancellation of removal because of that conviction. *See* 8 U.S.C. 1229b(a). Under the Government's view, such individuals must remain detained while they litigate their relief applications, even if they are likely to prevail.[1]

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[1] The Government's brief does not make clear whether it recognizes an exception to mandatory detention for individuals detained either while judicial review of their removal orders is pending or after their cases are remanded—an exception that

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The decision below rests on a substantial evidentiary record that is largely ignored in the Government's petition. The record includes detailed information about approximately 1,000 Class members (the "studied Class members") drawn from their immigration files and extensive database information about them. The record also includes depositions of government officials, declarations from Class members, and documents containing the Government's policies and trainings.

The certified Class was defined by the district court to include all noncitizens in the Central District of California detained by DHS for more than six months while their cases remain pending without a hearing to determine whether their detention remains justified. The Class definition, however, expressly excludes any noncitizens detained for national security reasons pursuant to separate statutes authorizing such detentions. In addition, the district court certified three Subclasses corresponding to the three provisions of the INA at issue in this case: 8

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would have mattered for lead Respondent Alejandro Rodriguez and many other Class members. *See Casas-Castrillon v. DHS*, 535 F.3d 942, 951 (9th Cir. 2008) (holding that such individuals are detained under Section 1226(a)); *Bejjani v. INS*, 271 F.3d 670, 689 (6th Cir. 2001) (same), *abrogated on other grounds by Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006); *Leslie v. Attorney Gen.*, 678 F.3d 265 (3d Cir. 2012) (same); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003) (same). *But see Akinwale v. Ashcroft*, 287 F.3d 1050 (11th Cir. 2002) (per curiam) (assuming, without analysis, that a stay serves to "suspend" the removal period, and that detention pending a judicial stay is therefore governed by 8 U.S.C. 1231(a)(2)).

U.S.C. 1225(b), 8 U.S.C. 1226(a), and 8 U.S.C. 1226(c).[2]

A. Record Facts About The Class

Prior to the preliminary and permanent injunctions in this case, Class members suffered lengthy detentions without hearings. Most Class members were incarcerated for far more than six months. The average detention for the studied Class members lasted approximately 404 days, with a median of nearly one year. Roughly 21% were incarcerated for more than 18 months, and roughly 9% for more than two years. Expert Reports of Susan B. Long, No. 13-56706, Dkt. 11-4 (hereinafter "Long Rep.") at ER 683, tbls.2, 3.[3]

Class members spent longer in detention than other noncitizens because they had substantial defenses to removal, which they often won. Long Rep. at ER 686 at tbl.7, 692 at tbl.17; *cf. id.* at ER 721-722.

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[2] The district court also certified a Subclass of individuals with administratively final orders of removal who are detained under 8 U.S.C. 1231(a). However, the Ninth Circuit held the Subclass "does not exist" because individuals detained pending completion of judicial review of a final order are held under Section 1226(a), and therefore part of a different Subclass. App. 51a, 47a.

[3] The statistics in this section are drawn from information about the studied Class members, which includes individuals in the three Subclasses. Facts specific to the Section 1225(b) and Section 1226(c) Subclasses are presented *infra*. Because the Government does not maintain database information from which Section 1226(a) Subclass members could be readily identified, the record does not contain database information specific to the Section 1226(a) Subclass. The parties disputed how to calculate some of these statistics, but the disputes are not material. For example, the Government asserted that the average detention length was best calculated as 334 rather than 404 days.

Of the studied Class members, 35% won their cases, compared with only 7% of a comparable set of all detainees. *Id.* at ER 721, tbl.35.

The vast majority of Class members—excluding asylum seekers who typically have had no prior contact with this country—had lived in the United States for years, often for decades, developing extensive ties. Roughly half arrived as children or young adults. *See* Declaration of Michael Tan, No. 13-56706, Dkt. 122 (hereinafter "Tan Dec.") at SER 172b-172d ¶¶ 31, 36 (46% age 21 or under at entry; 30% age 18 or under). Over 60% had U.S. citizen children. *Id.* at SER 169-171 ¶¶ 15-20. Their detention resulted in the loss of crucial support for their relatives, including sick parents, small children, and older children pursuing higher education. Declaration of Ahilan Arulanantham, No. 13-56709, Dkt. 142-2 (hereinafter "Arulanantham Dec.") at SER 83-84 ¶¶ 47-52 (Class member unable to care for sick mother and then denied request to attend her funeral), SER 80 ¶ 44 (Class member unable to support young children), SER 86 ¶ 71 (daughter dropped out of college because of father's detention).

B. Record Facts About Lead Respondent Alejandro Rodriguez

Mr. Rodriguez, a long time LPR who was brought to the United States as an infant, was detained more than three years before the Government released him during this litigation. He ultimately won his case.

Before his removal proceedings began, Mr. Rodriguez worked as a dental assistant. In 2003, he was convicted of possession of a controlled substance and sentenced to five years of probation. He also had a prior conviction for "joyriding."

ICE commenced removal proceedings against Mr. Rodriguez in April 2004, and at that time subjected him to mandatory detention under Section 1226(c). Shortly thereafter, an Immigration Judge determined that his "joyriding" conviction was an "aggravated felony," and therefore ordered him removed. After the Board of Immigration Appeals ("BIA") rejected his appeal, he filed a petition for review to the Ninth Circuit, which stayed his removal order. This process took approximately nine months.

The Ninth Circuit took approximately four years to decide Mr. Rodriguez's petition for review. Between July 2005 and March 2007, ICE conducted five "custody reviews" in his case—paper reviews of his file by DHS detention officers. The first four determined that he should remain detained because, if he lost his case in the Ninth Circuit, his removal to Mexico would be foreseeable.

However, in July 2007, about a month after Mr. Rodriguez had moved for Class certification in this litigation, ICE conducted a fifth custody review and ordered him released.[4] Ultimately, ICE incarcerated Mr. Rodriguez for 1,189 days before it released him.

About five months later, the Ninth Circuit granted the Government's unopposed motion to vacate and remand his case because his "joyriding" conviction was *not* an aggravated felony. On remand, the Immigration Judge exercised his discretion to grant Mr. Rodriguez cancellation of removal, thus allowing him to retain his lawful permanent resident status.

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[4] Shortly afterward, the Government argued that Mr. Rodriguez's release mooted the detention challenge and rendered him an unfit Class representative. App. 105a. The Ninth Circuit rejected that argument. *Id.* at 116a-118a.

ICE chose not to appeal, thus ending the proceedings 2,650 days after his initial detention.

C. Record Facts About The Section 1225(b) Subclass

Most members of the Section 1225(b) Subclass are apprehended at a port of entry and initially detained as "alien[s] seeking admission." 8 U.S.C. 1225(b)(2)(A). Regulations classify those stopped at the border, including LPRs returning from travel abroad, as "arriving aliens," 8 C.F.R. 1.2, and purport to deprive Immigration Judges of jurisdiction to review the custody status of all "[a]rriving aliens." *See* 8 C.F.R. 1003.19(h)(2)(i)(B).

While most members of the Section 1225(b) Subclass are asylum seekers without prior ties to this country, this Subclass also includes LPRs. The Government routinely detains lawful permanent residents upon their return from travel abroad as "arriving" noncitizens. *See, e.g.*, *Chen v. Aitken*, 917 F. Supp. 2d 1013, 1016, 1018-19 (N.D. Cal. 2013). The record contains evidence of one such Class member. Supp. Brief, No. 13-56706, Dkt. 122, at SER 5e (citing Declaration of Ahilan Arulanantham ¶ 4).

Section 1225(b) Subclass members were detained without hearings for an average of 346 days. Long Rep. at ER 703, tbl.27. 97% applied for asylum, and 64% won their cases. *Id.* at ER 703, tbl.28. The overwhelming majority had no criminal history. Deposition of Wesley Lee, No. 13-56706, Dkt. 122, (hereinafter "Lee Dep.") at SER 151:20-24.

D. Record Facts About The Section 1226(c) Subclass

Section 1226(c) Subclass members were subject to somewhat longer detention than Class members as a

whole, with an average of 427 days. Long Rep. at ER 701, tbl.24. 70% filed for relief that would allow them to avoid entry of a removal order, and 39% of those won it. *Id.* at ER 701, tbl.23. Additionally, approximately 4% won their cases by termination. *Id.* at ER 702, tbl.25-26.

While Section 1226(c) Subclass members by definition have some criminal history, many have convictions for relatively minor offenses and spend far more time in immigration custody than they served for the offenses that triggered mandatory detention. *See* Declaration of Cody Jacobs, No. 13-56706, Dkt. 122 (hereinafter "Jacobs Dec.") at SER 128-129 ¶ 8 (documenting three Class members with controlled substance convictions—for which they were sentenced to 90 days or less—detained 600 days, 646 days and 764 days before winning their immigration cases); Arulanantham Dec. at SER 76-77 ¶¶ 28-31 (long-time LPR with a possession of controlled substance conviction—for which he received diversion sentence—detained 305 days before winning his case). For all Class members with some criminal history, more than half did not have convictions for crimes serious enough to warrant a sentence over six months. *See* Jacobs Dec. at SER 127-28 ¶ 7.

E. Hearings Under The Preliminary And Permanent Injunctions

The outcomes of hearings conducted under the preliminary and permanent injunctions demonstrate that the vast majority of Class members do not present a risk of danger or flight requiring their detention. In approximately 70% of hearings conducted under the injunctions, an Immigration Judge concluded that the Class member's detention was not warranted, and ordered the Class member released

on bond or other conditions. Exhibit B to Patler Declaration, No. 13-56706, Dkt. 24-4 (herein-after "Patler Dec., Ex. B") fig.1. Of those ordered released on bond, 70% posted the bond. *Id.* fig.2; *see also* App. 62a n.2 (observing that approximately two-thirds of Class members given hearings under the preliminary injunction were released). In total, from October 2012 to April 2014, at least 700 Class members were released as a result of the injunctions in this case in the Central District of California, preventing their unnecessary detention for months or years, at great savings to the Government. Patler Dec., Ex. B, fig.2; Long Rep. at ER 693-694, tbl.18.

REASONS FOR DENYING THE PETITION

I. THE SECTION 1225(b) RULING DOES NOT WARRANT CERTIORARI.

A. The Ninth Circuit's Section 1225(b) Ruling Correctly Applies This Court's Precedent And Creates No Conflict With Any Other Circuit.

1. The Ninth Circuit is the only circuit to rule on the question of whether individuals detained under Section 1225(b) for prolonged periods are entitled to hearings to determine if their detention remains justified. Absent any circuit conflict, further percolation in the lower courts is appropriate to determine whether this Court's review is warranted. *See* Sup. Ct. R. 10(a).[5]

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[5] The Ninth Circuit first construed Section 1225(b) not to authorize prolonged detention in *Nadarajah v. Gonzales*, 443 F.3d 1069, 1078-79 (9th Cir. 2006). The Third Circuit noted but declined to address a similar question in *Tineo v. Ashcroft*, 350 F.3d 382, 399 (3d Cir. 2003). District courts have disagreed on the question, although more have favored Respondents' view.

2. The Government asserts that the Ninth Circuit's decision conflicts with *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which it reads to hold that noncitizens arriving at the border have no due process rights with respect to their admission or detention. Pet. 12-14. But the Ninth Circuit affirmed that reading of *Mezei*. App. 84a-85a. It ruled only on statutory grounds, based on a straightforward application of *Clark v. Martinez*, 543 U.S. 371 (2005). *See* App. 86a-89a (citing *Clark*, 543 U.S. at 380).

In *Clark*, this Court held that the construction of Section 1231(a)(6) that it applied in *Zadvydas v. Davis*, 533 U.S. 678 (2001)—to avoid the constitutional concerns that would have been presented by the indefinite detention of *admitted* noncitizens—also governed the cases of *inadmissible* noncitizens. 543 U.S. at 377-78. "It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Id.* at 380.

Accordingly, because individuals who have already entered the country and returning LPRs are subject to detention under the relevant provisions of Section 1225(b), the Ninth Circuit correctly found that the

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See, e.g., Maldonado v. Macias, — F. Supp. 3d —, 2015 WL 8958848, at *15-17 (W.D. Tex. Dec. 15, 2015) (ordering bond hearing for arriving asylum seeker detained 26 months under Section 1225(b)); *Chen*, 917 F. Supp. 2d at 1016, 1018-19 (same, for returning LPR detained nearly eight months); *but see Cardona v. Nalls-Castillo*, — F. Supp. 3d —, 2016 WL 1553430 (S.D.N.Y. Apr. 14, 2016) (returning LPR detained 14 months not entitled to bond hearing).

statute's construction is governed by *Clark* rather than *Mezei*, and therefore must be construed to avoid the serious constitutional problems arising from the prolonged detention of LPRs without hearings.[6]

Given that the Government already provides bond hearings to individuals detained under Section 1225(b)(1)(B)(ii), *see supra* at 4 (citing *X-K-*), and that neither that provision nor Section 1225(b)(2)(A) expressly authorizes detention after an individual is placed in removal proceedings, let alone for months or years while those proceedings continue, both easily can be read to permit hearings for individuals subject to prolonged detention.

Contrary to the Government's claim, Pet. 16-17, Congress has no authority to strip returning LPRs of due process protections merely because of their criminal history or alleged unlawful conduct while abroad. *Plasencia*, 459 U.S. at 32-36, accorded due process protections to a returning LPR even as it acknowledged that she could, as a statutory matter, be subjected to exclusion proceedings. *Id.* at 32, 34. *Plasencia* held that returning LPRs who are seeking admission retain their due process rights, unless—like the petitioner in *Mezei*—they have forfeited their lawful permanent status by a lengthy absence from the country. *See* App. 89a. *Mezei* itself recognized that Congress could not strip returning LPRs of their due process rights merely by changing the relevant statutory definitions. *See* 345 U.S. at 213 ("To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due

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[6] Those problems are similar to the problems created by the prolonged mandatory detention of LPRs under Section 1226(c). *See infra* Sec. II.C.

process."); *accord Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953).

The Government also argues that the Ninth Circuit's ruling conflicts with *Mezei* because, by allowing for the possibility that arriving noncitizens will be released into the country, it "deprived the Executive of plenary control to protect the Nation's borders." Pet. 28; *see also id.* at 10, 12-14. But the mere fact that the ruling results in some arriving noncitizens being released from detention cannot create conflict with *Mezei*, because *Clark* also authorized the release of arriving noncitizens. The Ninth Circuit's application of *Clark* does not grant Immigration Judges (whose decisions can be reversed by the Attorney General, *see* 8 C.F.R. 1003.1(h)), any authority to *admit* individuals into the United States, it only permits Immigration Judges to review their continued detention. As *Zadvydas* held, an individual released from detention does not gain the right to reside in the United States, but merely the right to be free of a restraint on their liberty. 533 U.S. at 695. Thus, the Ninth Circuit's decision involves no shift in control of the nation's borders from the "political branches" to the judiciary.

Moreover, although the Ninth Circuit disagreed with this assertion, the district court's ruling is also consistent with *Mezei* because "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious," *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting). In addition, by definition, Class members have not been classified by the Attorney General as national security threats (as Mr. Mezei was). Nor have they been "denied entry"; the majority will win asylum. *Compare Mezei*, 345 U.S. at 212 (quoting *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

The record evidence shows that the Government's current system for releasing them—the parole process—gives rise to prolonged and arbitrary incarceration. *See, e.g.*, Arulanantham Dec. at SER 93 ¶ 97 (Class member denied release based on documents that referred to the wrong detainee; detained for 319 days without a hearing, and released only after winning asylum claim); *see also Nadarajah v. Gonzales*, 443 F.3d 1069 (9th Cir. 2006) (arriving asylum seeker detained four and a half years while case was pending despite repeatedly winning asylum before Immigration Judge). The record establishes that the parole system affords "no way" to correct egregious errors such as these, because there is no record of decision, no hearing before a judge, and no right to appeal. Lee Dep. at SER 164:5-12. *Mezei* does not authorize detention under such circumstances.

3. Finally, if the Court accepts the Government's view that application of the doctrine of constitutional avoidance to Section 1225(b) turns on the existence of lawful permanent residents in this Subclass, *see* Pet. 16, which Respondents contest, this case would present a poor vehicle for resolving the issue because it would require resolution of a significant factual dispute. *Cf.* Sup. Ct. R. 10. Contrary to the Ninth Circuit's conclusion, *see* App. 43a, the record *does* identify an LPR detained under Section 1225(b). The record would contain more information about such individuals had the Government ever contested their existence in the district court. It did not, despite a declaration in the record documenting an LPR in this Subclass. *See* Supp. Brief, No. 13-56706, Dkt. 122, at SER 5e (citing Declaration of Ahilan Arulanantham ¶ 4).

B. The Ninth Circuit's Section 1225(b) Ruling Does Not Have Practical Consequences That Warrant Certiorari.

1. The Government's speculation about the practical consequences of the Ninth Circuit's Section 1225(b) ruling also do not justify this Court's intervention. The Government provides no evidence, statistical or otherwise, to support its claim that requiring hearings for arriving noncitizens who have been detained more than six months will have dire consequences; nor did it provide any in the district court.

Hearings under the Ninth Circuit's injunctions have been taking place for three and a half years, including for ten months prior to the summary judgment ruling. Yet the Government submits no evidence to support its speculation that arriving noncitizens released after *Rodriguez* hearings failed to appear for their removal proceedings at a rate higher than the general immigration detainee population; that Immigration Judges have ordered the release of individuals who failed to establish their identity; that arriving noncitizens have increasingly engaged in dilatory tactics in their removal proceedings; that the injunction has encouraged more individuals to attempt unlawful entry into the country to obtain the benefits of the Ninth Circuit's ruling; or even that illegal entries have increased within the Ninth Circuit.

The record evidence stands in contrast to the Government's parade of horribles. Under the injunction, bona fide asylum seekers—who make up a clear majority of the Section 1225(b) Subclass, *see* Long Rep. at ER 703, tbl.28—can now obtain release after being subject to prolonged incarceration because the Government refuses to release them on parole,

often for blatantly erroneous reasons. *See generally* Arulanantham Dec. at SER 88-94 ¶¶ 78-101.

2. The Government errs in asserting that the Ninth Circuit's construction of Section 1225(b), coupled with its ruling on the burden of proof, requires the release of individuals whose identities cannot be established. *See* Pet. 19, 31. The Subclass includes only those arriving noncitizens subject to prolonged detention under 8 U.S.C. 1225(b)(1)(B)(ii) and 8 U.S.C. 1225(b)(2)(A). *See* App. 108a. The only asylum seekers detained under those statutes are individuals who have passed a credible fear screening and been referred for removal proceedings.

The government conducts biographic and biometric checks during the credible fear interview to establish identity. *See* Department of Homeland Security, written testimony of Joseph Langlois for House Committee on Oversight and Government Reform, Subcommittee on National Security hearing titled *Border Security Oversight, Part III: Examining Asylum Requests* (July 17, 2013), https://www.dhs.gov/news/2013/07/17/written-testimony-uscis-house-oversight-and-government-reform-subcommittee-national. Only those detainees who pass a credible fear interview can remain in the United States to pursue asylum through removal proceedings before an Immigration Judge, where they will again be required to establish their identity. *Matter of O-D-*, 21 I. & N. Dec. 1079, 1082 (B.I.A. 1998) (noting that the applicant's "identity" is "perhaps the most critical of elements" of an asylum claim); *see also* 8 U.S.C. 1158(d)(5)(A)(i) (requiring identity check). DHS has extensive access to domestic and international law enforcement databases, as well as technologies like electronic fingerprinting and facial recognition, to allow it to test individuals' claims over the course of

six months before any hearing where the Government must justify their detention.

3. The Government also errs in claiming that the Section 1225(b) ruling "creates incentives for aliens to attempt an illegal entry and, if caught, to delay proceedings long enough to obtain . . . a bond hearing," Pet. 33. The Government is *already* providing bond hearings to individuals who are apprehended after unlawfully crossing the border if they pass a credible fear interview, long before they are detained for six months. *X-K-*, 23 I. & N. Dec. at 734-35. To the extent that the possibility of release through a hearing provided after six months of incarceration creates significant incentives for illegal entry and delays, a claim for which there is no record evidence, those incentives would already exist because of the Government's initial provision of bond hearings to those who enter the United States illegally. Hearings under the Ninth Circuit's decision—provided *six months* after detention, and for the first time only to those arriving at ports of entry—could hardly add to those incentives in any material way.

4. The Government's insistence that the Section 1225(b) ruling creates serious consequences warranting this Court's review is also undermined by the procedural history of this case. The Ninth Circuit affirmed the district court's preliminary injunction granting hearings to Section 1226(b) Subclass members where DHS bears the burden of proof by clear and convincing evidence in April 2013, but the Government chose not to petition for rehearing or seek *certiorari* at that time.

II. THE SECTION 1226(c) RULING DOES NOT WARRANT CERTIORARI.

The Ninth Circuit's ruling as to Section 1226(c) also does not warrant this Court's review. Every circuit to address the issue has rejected the Government's position that it has unlimited authority to subject noncitizens to mandatory detention under 8 U.S.C. 1226(c) so long as their removal case remains pending. The circuits have differed only on *when* and *how* individuals subject to prolonged detention can access procedures permitting their release, and their views on those questions continue to percolate. Nor do the Ninth and Second Circuits' decisions—which simply require the Government to justify incarcerating someone for more than six months—present the type of extraordinary practical problems that warrant this Court's review. Those courts correctly found that the mandatory detention of noncitizens under Section 1226(c) is limited to six months, after which the Government must justify the need for continued detention at a hearing.

A. Review Of The Ninth Circuit's Section 1226(c) Ruling Is Premature While The Circuits Continue To Refine The Proper Approach To Implementing The "Reasonableness" Limitation In Section 1226(c).

1. The circuits have uniformly agreed that detention under Section 1226(c) must be limited to a "reasonable" period. *See Reid v. Donelan*, — F.3d —, 2016 WL 1458915, at *4 (1st Cir. Apr. 13, 2016) ("every federal court of appeals to examine § 1226(c) has recognized that the Due Process Clause imposes some form of 'reasonableness' limitation upon the duration of detention that can be considered justifiable under that statute"); App. 75a-80a; *Lora v.*

Shanahan, 804 F.3d 601, 606 (2d Cir. 2015), *petition for cert. filed*, No. 15-1205 (Mar. 28, 2016), No. 15-1307 (Apr. 25, 2016); *Diop v. ICE*, 656 F.3d 221, 232-33 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 270 (6th Cir. 2003).

2. While the circuits differ about when and how to determine what constitutes a "reasonable" period under Section 1226(c), their positions continue to evolve. Two circuits—the Ninth and the Second—have construed Section 1226(c) to be limited to six months, after which time an Immigration Judge must conduct an inquiry to determine whether detention remains justified. *See* App. 32a-38a; *Lora*, 804 F.3d at 606. By contrast, three circuits—the First, Third, and Sixth Circuits—have declined to set any particular time at which a "reasonableness" determination must be made, and have either presumed or explicitly decided that a noncitizen must file a habeas petition in federal court to obtain such a determination, but beyond that their approaches have diverged. The Sixth Circuit has held that district courts sitting in habeas should order the release of individuals whose detention exceeds a reasonable time. *Ly*, 351 F.3d at 270. In contrast, the First and Third Circuits have held that once mandatory detention becomes unreasonable (as determined, presumably, by a district court sitting in habeas), a hearing before an Immigration Judge is required to assess danger and flight risk. *See Reid*, 2016 WL 1458915, at *9; *Diop*, 656 F.3d at 233.

After district courts in the Third Circuit struggled to apply consistent and administrable rules in making reasonableness determinations, the Third Circuit moved towards a time-based approach. In *Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015), that court analyzed detention

length "for the sake of providing clear guidance to the Attorney General," and held that where there are no "extraordinary delays" and parties "act[] in good faith," "beginning sometime after the six-month timeframe considered by *Demore*, and certainly by the time [the noncitizen] had been detained for one year, the burdens to [his] liberties outweighed any justification for using presumptions to detain him without bond to further the goals of the statute." *Id.* at 477 & n.11, 478. *See also Lora*, 804 F.3d at 615 (observing the "the pervasive inconsistency and confusion exhibited by district courts in [the Second] Circuit when asked to apply a reasonableness test on a case-by-case basis" prior to adoption of six-month limit). Several district courts in the Third Circuit have recently read Section 1226(c) as presumptively limiting mandatory detention to one year. *See, e.g.*, *Deptula v. Lynch*, No. 1:15-CV-2228, 2016 WL 98152, at *3 (M.D. Pa. Jan. 8, 2016) (ordering bond hearing for noncitizen whose detention "exceeds [the] one-year [] period of time which *Chavez-Alvarez* found to be presumptively excessive").

The First Circuit's recent *Reid* decision also illustrates that the circuits continue to encourage district courts to develop procedures for applying the "reasonableness" limitation needed to render mandatory detention under Section 1226(c) consistent with due process constraints. While the First Circuit followed the Third Circuit's path, it also enccouraged the district court and the agency to develop alternative approaches over time. *Reid*, 2016 WL 1458915, at *9 n.3; *id.* at *12 n.5. This Court would benefit by seeing the results of such approaches.

This perspective from the First Circuit and the Third Circuit's evolution mirrors the history of the

Ninth Circuit's time-based approach. The rule established in *Rodriguez* followed the Ninth Circuit's extended engagement with a system that lacked administrable rules governing the length of mandatory detention. The Court rejected prolonged mandatory detention nearly a decade before *Rodriguez III*, in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), but continued to see pervasive prolonged detention in the years following that decision. *See Nadarajah*, 443 F.3d at 1080 (noncitizen detained pending removal proceedings for nearly five years); *Casas-Castrillon v. DHS*, 535 F.3d 942, 944 (9th Cir. 2008) (detention without bond hearing for seven years while case pending); *Aguilar-Ramos v. Holder*, 594 F.3d 701, 704 n.3 (9th Cir. 2010) ("express[ing] grave concerns over Aguilar's four-year detention" while case pending); *Singh v. Holder*, 638 F.3d 1196, 1203 (9th Cir. 2011) (nearly four years). Having "grappled in piece-meal fashion" with the issue for a decade, App. 110a, the Ninth Circuit ultimately concluded that the statute was best read to requires hearings at six months.

3. The circuits' evolution demonstrates that a time-based limitation on Section 1226(c) is not only more faithful to Congressional design, *see infra* Sec. II.C., but also far more practical: it "provide[s] clear guidance and ease of administration to Government officials," *Lora*, 804 F.3d at 615; entrusts detention review to the immigration courts, which have the institutional competence and individualized knowledge to efficiently conduct the review; avoids duplicative review by the federal courts; and ensures that noncitizens—many of whom are unrepresented and lacking in the legal sophistication needed to file a habeas petition—are in fact able to obtain review of

whether their detention remains reasonable despite its length. *See id.* at 615-16; App. 48a.

B. The Practical Consequences Of The Ninth Circuit's Section 1226(c) Ruling Do Not Warrant This Court's Review.

1. The Government raises the specter of terrorism—asserting 21 times that the Ninth Circuit ruling applies to "terrorists"—but the *Rodriguez* Class specifically excludes noncitizens held under the national-security detention statutes. *See* Pet. 20 n.3. Those statutes explicitly authorize prolonged detention without bond hearings for national security detainees, but subject their cases to high-level review within the Department of Justice. *See* 8 U.S.C. 1226a(a); 8 U.S.C. 1531, *et seq.* The Government has never identified an individual charged as a terrorist in the Class since it was first certified in 2011, nor has it explained why the authority Congress specifically provided for prolonged mandatory detention in national security cases cannot suffice to protect its interests.

2. The Government suggests that the ruling will lead to the release of individuals who are dangers or flight risks by citing outdated statistics from *Demore*, Pet. 24, but those statistics do not concern the prolonged detainees at issue here. Moreover, record evidence demonstrates that Section 1226(c) Subclass members prevail in their immigration cases at remarkably high rates, and that many have minor criminal histories. *See supra* at 10-11.[7]

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[7] Should this Court grant *certiorari*, Respondents will defend the Ninth Circuit's decision on the alternative ground that individuals who remain eligible for relief from removal or have other substantial defenses are not "deportable," and therefore not subject to mandatory detention. *See Gonzalez v. O'Connell*,

Furthermore, since *Demore*, the Government has adopted new, sophisticated alternatives to detention that have proven effective in preventing recidivism and flight. *See* Deposition Transcript of Eric G. Saldana, No. 13-56706, Dkt. 122 (hereinafter "Saldana Dep.") at SER 181:2-24 (Government witness testimony that programs are close to 100% effective in some regions).

Similarly, the Government's citation to generalized data about *in absentia* orders (Pet. 27) is irrelevant to this case because it is nationwide data that includes people released by ICE and individuals released on a bond set by an Immigration Judge at the outset of their detention, rather than data about prolonged detainees released by Immigration Judges in the Ninth Circuit. For these and other reasons, the Ninth Circuit expressly held that reliance on the Government's *in absentia* data was unjustified on this record.[8]

3. The Government asserts that the Ninth Circuit's ruling creates an incentive for noncitizens to engage in "dilatory and obstructive tactics" by seeking frivolous continuances, Pet. 18, but this concern is misguided. Regulations require that a

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355 F.3d 1010, 1019-20 (7th Cir. 2004) ("[*Demore*] left open the question of whether mandatory detention under § 1226(c) is consistent with due process when a detainee makes a colorable claim that he is not in fact deportable.").

[8] The Ninth Circuit denied the Government's request for judicial notice of a prior edition of the EOIR Statistical Yearbook, a source of data on which the Government now relies. After Respondents raised significant questions about the accuracy, reliability, and relevance of the statistics, the Ninth Circuit declined to notice them, finding that they were "subject to reasonable dispute." *See* Request for Judicial Notice Order, No. 13-56706, Dkt. 133, at 6-7.

continuance be granted only for "good cause," 8 C.F.R. 1003.29, and contrary to the Government's suggestion, the Ninth Circuit has not altered this rule to require Immigration Judges "to grant multiple continuances" regardless of whether they are justified. Pet. 18. The Ninth Circuit has issued numerous decisions upholding continuance denials where the noncitizen failed to establish "good cause," including requests for more than one continuance. *See Sandoval-Luna v. Mukasey*, 526 F.3d 1243, 1247 (9th Cir. 2008) (per curiam) (upholding denial of second continuance); *Claudio-Alas v. Holder*, 594 F. App'x 360, 361 (9th Cir. 2015) (mem.) (same); *Rodarte-Rodarte v. Holder*, 529 F. App'x 830, 831 (9th Cir. 2013) (mem.) (same); *Matias v. Holder*, 402 F. App'x 241 (9th Cir. 2010) (mem.) (same).

Regardless, all of the Government's concerns can be addressed at the hearings conducted to determine whether detention remains justified. In the event that a noncitizen engages in "dilatory and obstructive tactics," the Immigration Judge should take such conduct into account and deny the individual's release. If an individual poses a danger, he should be denied release on that basis. The fact the Government may have good reason to detain *some* Class members is not a valid basis to deny *all* Class members—including those like Mr. Rodriguez whose detention is unwarranted—any opportunity to request release.

4. The Government's unsupported claim that the Ninth Circuit's ruling creates excessive burdens on the immigration courts, Pet. 31-32, cannot be reconciled with the fact that prolonged detainees constitute a small percentage of the overall immigration court docket, or with the sworn testimony of a supervisory Immigration Judge that

the immigration courts are well-equipped to handle a significant increase in hearings in detained cases. *See* Opposition to Emergency Motion to Stay Preliminary Injunction, No. 12-56734, Dkt. 3-1, at 11-13; *id.* Dkt. 3-3 (Exhibit 2, excerpts of Fong Dep.). Nor is there record evidence suggesting that burdens have appreciably increased in the Ninth Circuit since the injunctions went into effect.

C. The Ninth Circuit's Section 1226(c) Ruling Involves A Straightforward Application Of Settled Law.

1. This Court has recognized that immigration detention, like other forms of non-punitive incarceration, must "bear[] a reasonable relation to [its] purpose," *Zadvydas*, 533 U.S. at 690-91 (alteration omitted), because noncitizens have a liberty interest in freedom from immigration detention. *Zadvydas* involved a detainee who had already lost the right to remain in the country, and thus was in "a position far different from aliens with a lawful right to remain here," as is true of many members of the Section 1226(c) Subclass. *Id.* at 720 (Kennedy, J., dissenting). Prolonged incarceration without the right *even to ask* for release on bond, particularly for a detainee pursuing a substantial defense, surely constitutes a significant deprivation of liberty.

2. The Government acknowledges that *Demore v. Kim*, 538 U.S. 510 (2003), on which it heavily relies to justify the prolonged detention at issue here, referenced the brevity of the detention it upheld, Pet. 21, but does not explain how its practice of prolonged mandatory detention comports with that limitation. *See* 538 U.S. at 513 (holding detention permissible for the "brief period necessary for . . . removal proceedings."); *id.* at 529 n.12 (noting "[t]he very limited

time of the detention at stake under § 1226(c)"); *see also id.* at 532-33 (Kennedy, J., concurring) ("respondent could be entitled to an individualized determination . . . if the continued detention became unreasonable or unjustified"). All Class members at issue here have been incarcerated for six months or more, significantly longer than the brief time periods this Court considered in *Demore*: "roughly a month and a half in the vast majority of cases in which [Section 1226(c)] is invoked, and about five months in the minority of cases in which the alien chooses to appeal." *Id.* at 530. *Compare* Long Rep. at ER 685, tbl.6 (average detention time for Class members before immigration court was 330 days, for Class members before the BIA 448 days, and for Class members at the Ninth Circuit 667 days).[9]

3. That Section 1226(c) is insufficiently clear to authorize prolonged mandatory detention also follows from the *statutory* holding of *Zadvydas*. *Zadvydas* construed 8 U.S.C. 1231(a)(6), which authorizes post-final order detention, to authorize detention for a presumptively-reasonable six month period. 533 U.S. at 701. Although the statute contains no explicit temporal limitation, the Court found the absence of any explicit directive to authorize prolonged

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[9] The Government is correct that the detainee in *Demore* was detained for six months prior to the habeas court granting relief, 538 U.S. at 530-31, but he did not argue that the statute did not authorize his detention because of its length. Instead, the Court construed his petition as having conceded that the statute authorized his detention, *id.* at 513-14, because he argued that even brief detention without a bond hearing was unconstitutional. The Government argued that the Court should leave for another day cases involving prolonged detention "because prolonged detention imposes a greater burden upon the alien." *See* Brief for the Petitioner at 48, *Demore*, No. 01-1491 (filed Aug. 29, 2002).

detention dispositive. *Id.* at 697 ("[I]f Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms."); *see also id.* at 689, 699.

4. Subsequent legislative history confirms the correctness of that approach. Congress has had multiple opportunities to overrule the Ninth Circuit's interpretation of Section 1226(c) since it was first adopted in 2005, but each time has declined to do so.[10] Congress's inaction belies the Government's claims that the Ninth Circuit's ruling is contrary to Congressional intent.

Because Section 1226(c) does not specify its temporal scope, this Court should not read it to implicitly authorize prolonged detention, particularly when Congress has explicitly authorized such detention in other statutes.

III. THE PROTECTIONS ORDERED BY THE NINTH CIRCUIT AT PROLONGED DETENTION HEARINGS DO NOT WARRANT CERTIORARI.

Review by this Court is not warranted to address the procedures the Ninth Circuit ordered for noncitizens facing detention beyond six months.

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[10] *See, e.g.*, Keep Our Communities Safe Act of 2011, H.R. 1932, 112th Cong. (2011), https://www.congress.gov/bill/112th-congress/house-bill/1932/text; Keep Our Communities Safe Act of 2013, H.R. 1901, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/house-bill/1901/text?q=%7B"search"%3A%5B"%5C"lamar+smith%5C""%5D%7D; Inhofe Amendment, Justice for Victims of Trafficking Act of 2015, S.Amdt. 275 to S. 178, 114th Cong. (2015-2016), https://www.congress.gov/amendment/114th-congress/senate-amendment/275/text. Four similar bills were introduced in either the House or Senate since 2011.

A. All Circuits To Consider The Issue Have Agreed That The Government Bears The Burden Of Proof In Hearings Involving Prolonged Detention.

1. No circuit has adopted a view contrary to the Ninth Circuit as to the burden or standard of proof necessary to justify prolonged detention. Among the five circuits that have recognized the need for hearings when detention becomes unreasonably prolonged, three have resolved the question of which party bears the burden at those hearings, and all agree that the government must bear it. *See Lora*, 804 F.3d at 615-16, *Diop*, 656 F.3d at 235, *Tijani*, 430 F.3d at 1242. Two circuits have addressed what standard of proof applies, and both agree that the government must show danger and flight risk by clear and convincing evidence. *See Lora*, 804 F.3d at 615-16, *Singh*, 638 F.3d at 1203.

The circuits' consistent rulings flow from this Court's precedent. "[D]ue process places a heightened burden of proof on the State in civil proceedings in which the 'individual interests at stake . . . are both "particularly important" and "more substantial than mere loss of money."'" *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (omission in original) (quoting *Santosky v. Kramer*, 455 U.S. 745 (1982)). Because "[f]reedom from imprisonment," lies "at the heart of the liberty interest" that the Due Process Clause protects, *Zadvydas*, 533 U.S. at 690, the Government must bear the burden of proof by clear and convincing evidence. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (commitment of insanity acquitee); *Woodby v. INS*, 385 U.S. 276, 285 (1966) (deportability); *Chaunt v. United States*, 364 U.S. 350, 351 (1960) (denaturalization).

Indeed, in rejecting prolonged post-final-order detention in *Zadvydas*, the Court relied on the fact that "the sole procedural protections . . . are found in administrative proceedings where *the alien bears the burden of proving he is not dangerous*." *Zadvydas*, 533 U.S. at 692 (emphasis added). And in upholding confinement in the civil commitment and pretrial detention contexts—to which *Zadvydas* analogized—this Court has recognized that the Government must justify detention by clear and convincing evidence. *See United States v. Salerno*, 481 U.S. 739, 751 (1987); *Addington v. Texas*, 441 U.S. 418, 432 (1979).[11]

The Government also relies on *Zadvydas*' purported placement of the burden on the detainee to show, in habeas, that "there is no significant likelihood of removal." Pet. 26-27. But, as *Zadvydas* recognized, there is a distinction between the procedures required to justify prolonged detention under the Due Process Clause, and what a detainee must show to bring a habeas petition. The Government has an obligation to provide hearing procedures that accord with constitutional constraints whether or not a detainee files a habeas petition.

2. No circuits have rejected the Ninth Circuit's conclusions (1) that the length of past detention must be considered as a factor at hearings to justify prolonged detention, and (2) that hearings must occur automatically every six months. The Court's analysis

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[11] The Government relies on regulations and BIA cases to argue that the Ninth Circuit "turned [the] scheme on its head" by placing the burden of proof on the Government to justify prolonged detention. Pet. 5-6, 8-9, but the regulations governing Immigration Judge bond hearings do not mention any burden of proof, and neither the regulations nor BIA precedent address prolonged detention. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1).

in *Zadvydas* demonstrates why those rulings are correct. *Zadvydas* recognized that the deprivation of liberty grows as detention continues. *See Zadvydas*, 533 U.S. at 701 (reasoning, in post-final-order context, that "for detention to remain reasonable, as the period of . . . confinement grows" the permissible length of future detention "conversely would have to shrink"). It follows that a greater deprivation of liberty requires a stronger governmental justification, such that Immigration Judges must consider the length of detention when determining whether confinement remains justified.

Substantial record evidence supports the Ninth Circuit's decision to order that the hearings for prolonged detainees occur automatically on a periodic basis. As the Ninth Circuit observed: "[d]etainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate." App. 48a. The Ninth Circuit found that "many class members are not aware of their right to a bond hearing and are poorly equipped to request one." *Id.* Under these circumstances, automatic hearings protect against the risk of erroneous deprivation that might otherwise result. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Ninth Circuit's procedural requirements impose a minimal burden on the Government. The Government stipulated below that it would not argue that "the cost of providing a bond hearing should be considered in this case as a factor weighing in favor of [the Government]." Joint Stipulation, No. 13-56706, Dkt. 122, at SER 191. Under these circumstances, there is no need for the Court to grant certiorari to review the Ninth Circuit's rulings regarding procedures for prolonged detention review hearings.

B. Neither The Immigration Laws Nor Applicable Regulations Prohibit The Prolonged Detention Hearings Ordered By The Ninth Circuit.

The Ninth Circuit held that prolonged detention review hearings occur under 8 U.S.C. 1226(a). App. 35a, 40a. That statute and its implementing regulations are silent as to what procedures apply in prolonged detention cases. *See* 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). Both should be construed to permit the constitutionally necessary protections the Ninth Circuit ordered, principally a hearing at six months where the Government bears the burden to demonstrate, by clear and convincing evidence, that continued detention is justified in light of its length. If the statute or regulations were read to permit prolonged detention without these protections, they would raise serious constitutional problems under this Court's precedent.

The Government argues that the Ninth Circuit's decision "represents a radical departure" from the statute and regulations. Pet. 10. But none of the statutory or regulatory provisions address what procedures are necessary to justify prolonged detention. Section 1226(c) provides the framework for detention when removal proceedings are of a "shorter duration," *Demore*, 538 U.S. at 528, but says nothing as to prolonged detention. Likewise, the regulations merely state that, after DHS makes a determination about whether to detain an individual, the noncitizen "may . . . request amelioration of the conditions under which he or she may be released" before an Immigration Judge. 8 C.F.R. 236.1(d)(1), 1236.1(d)(1). Nowhere do these provisions address procedures in detention review hearings at all, let alone the procedures applicable to prolonged detention cases.

The Ninth Circuit properly construed these provisions to avoid the constitutional problem that would otherwise be created. *See, e.g.*, *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (construing immigration regulations to avoid constitutional problems).[12]

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[12] The Government argues for *Chevron* deference, *see* Pet. 26, but no deference is warranted when an interpretation raises constitutional problems, as this Court's recent immigration detention cases make clear. *See, e.g.*, *Zadvydas*, 533 U.S. at 695 (rejecting argument that "the Judicial Branch must defer to Executive and Legislative Branch decisionmaking in" the immigration context because "that power is subject to important constitutional limitations").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

SEAN COMMONS
WEN W. SHEN
SIDLEY AUSTIN LLP
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

JUDY RABINOVITZ
MICHAEL TAN
ACLU IMMIGRANTS' RIGHTS PROJECT
125 Broad Street
18th Floor
New York, NY 10004
(212) 549-2618

AHILAN T. ARULANANTHAM*
MICHAEL KAUFMAN
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West Eighth Street
Los Angeles, CA 90017
(213) 977-5211
aarulanantham@aclusocal.org

JAYASHRI SRIKANTIAH
STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-2442

Counsel for Respondent

* Counsel of Record

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